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No. 92-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

GUILLERMO AVILA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

1. Where the 5th Circuit Court of Appeals admittedly promulgated an entrapment doctrine in February of 1992 in total and complete conflict with the subsequent, newly formulated entrapment doctrine as defined on April 6, 1992, in Jacobson v. United States, 112 S.Ct.1535, 118 L.Ed.2d 147, 60 U.S.L.W. 4307, where in their final decision on a Motion for Rehearing, the 5th Circuit failed to consider the Jacobson, id at 1535, test demanding that the Government at trial prove prior, independent predisposition to commit a crime, whether this obligates the Court to render a dismissal of the case.

2. Where the Fifth Circuit decided a federal question in a manner that conflicts with the Congressional intent underlying a federal stature, 18 U.S.C. 1956 [laundering of a money instrument]

which refers only to statutorily defined monetary instruments and not to laundering any type of property, whether this obligates the Court to render a dismissal or reversal?

3. Where the Fifth Circuit has decided important questions of federal law concerning the inclusion of non-monetary instruments in the federal statute that proscribes only the "laundering of a monetary instrument" in conflict with federal Congressional intent creating considerable vagueness, whether this obligates the Court to render a dismissal or a reversal?

4. Where the trial Court failed to give Avila's requested jury instructions on specific intent, willfulness, and ignorance of the law, whether this demands a reversal?

5. Is there a distinct Fifth

Amendment "outrageous Government conduct"

defense in entrapment cases?

(1b) PARTIES INVOLVED [per rule 21.1(b)]

Petitioner, Guillermo Avila, was the defendant in the United States District Court for the Western District, El Paso, Texas, and appellant in the United States Court of Appeals for the Fifth Circuit.

Respondent, United States of America, was the plaintiff in the District Court, and appellee in the Court of Appeals.

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(1d) Judgment Below

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GUILLERMO AVILA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES Court OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Guillermo Avila, (hereafter, petitioner, or defendant), respectfully prays that a Writ of Certiorari issue to review the judgment affirming the judgment (conviction and sentence) of the United States Court of Appeals for the Fifth Circuit that affirmed that Guillermo Avila was guilty of conspiracy to launder

monetary instruments and of the substantive offense sentencing him to 10 months.

Judgment, Opinion, and Orders Below

The opinion of the Court of Appeals affirming defendant's conviction and sentence is reported as United States v. Avila, 955 F.2d 331 (5th Circuit. 1992), and appears in Appendix A to this Petition filed on Feb. 27, 1992. A timely Petition for Rehearing was filed on April 12, 1992. The Court of Appeals denial of the Petition for Rehearing was issued on June 2, 1992, and is attached as App.B. Associate Judge Scalia gave written permission for the Petitioner to submit his Petition for a Writ of Cert by October 30, 1992, and is attached as App.C.

(1e) Jurisdictional Statement

The Court of Appeals Opinion in this matter was filed on Feb. 27, 1992. A timely Petition for Rehearing was filed on April 12, 1992. The Court of Appeals denial of the Petition for Rehearing was issued on June 2, 1992, and is set forth in Appendix D. Associate Judge Scalia gave written permission for the Petitioner to submit his Petition for a Writ of Cert by October 30, 1992. This Court's jurisdiction is invoked under Title 28, U.S.C. s. 1254 (1), 1257 (a) and rules 10.1, 12.1 and 13.1 of this Court.

CONSTITUTIONAL PROVISIONS

Due process of law is guaranteed by the Fifth Amendment to the U.S. Constitution, which provides, in pertinent part:

> "No person shall ... be deprived of ... liberty without due process of law."

STATEMENT OF THE CASE

The United States District Court for the Western District of Texas, El Paso Division, had jurisdiction pursuant to Title 18, U.S.C. s. 3231.

By grand jury indictment returned in the El Paso Division of the Western District of Texas on November 1, 1989, Appellant Guillermo Avila was charged with the following: conspiring with Gabriel I. Yanez and Victor R. Arditti to avoid filing two currency transaction forms (Internal Revenue Service Form 4789 and Custom Form 4790)(31 U.S.C. 5313(a); 31 U.S.C. 5316) and to launder a monetary instrument in violation of 18 U.S.C. 371 and 1956 (count one) and with conducting and attempting to conduct a financial transaction with the intent to conceal and disguise the nature, location, source, ownership and control of property believed

to be the proceeds of drug trafficking or with the intent to promote the unlawful activity, in violation of 18 U.S.C. 1956(a) (3) (counts seven and eight) (3 R. 807-24).' Appellant Avila's case was severed for trial upon his motion (3 R. 683). The jury only convicted Appellant Avila of three offenses with which he was charged (2 R. 546). Avila was subsequently sentenced to concurrent terms of 10 months imprisonment and three years of supervised release, fined $5,000, and assessed $150 (1 R. 17-21). He timely appealed (1 R. 16). On February 27, 1992, the Fifth Court of Appeals affirmed the lower Court decision. The Fifth Circuit affirmed that Guillermo Avila was convicted of conspiracy to launder monetary instruments and of the substantive offense.

Appellant timely appealed with a

MOTION FOR REHEARING which was denied on June 2, 1992. Avila petitioned to the United States Supreme Court for an extension of time within which to file for a petition for a writ of certiorari to the United states Supreme Court which was granted on August 28, 1992, allowing Avila to October 30, 1992, to file.

REASONS FOR GRANTING CERTIORARI

1.

The 5th Circuit Court of Appeals admittedly promulgated an entrapment doctrine in February of 1992 which is now in total and complete conflict with the subsequent, newly formulated entrapment doctrine as defined on April 6, 1992, in Jacobson v. United States, 112 S.Ct.1535, 118 L.Ed.2d 147, 60 U.S.L.W. 4307, where in their final decision on a Motion for Rehearing, the 5th Circuit failed to consider the Jacobson, id at 1535, test demanding that the Government at trial prove prior, independent predisposition to commit a crime. This obligates the Court to render a dismissal of the case.

On April, 6, 1992, the Supreme Court of the United States delivered a monumental decision that mandates that this case presently at bar be totally and completely reversed. In JACOBSON v. UNITED STATES, JACOBSON v. UNITED STATES, 112 S.Ct. 1535, 118 L.Ed.2d 147, 60 U.S.L.W. 4307, argued November 6, 1991, decided on April 6, 1992. Here, the Supreme Court redefines "predisposition", and introduces a new

requirement that the Government at trial must prove prior, independent predisposition before any government contact with the subject of the criminal investigation. The Court adds something new to the burden of proving predisposition.

In JACOBSON v. UNITED STATES, 112 S.Ct. 1535, 118 L.Ed.2d 147, 60 U.S.L.W. 4307, petitioner JACOBSON ordered a magazine depicting young boys engaged in sexual activities. He was arrested after a controlled delivery of a photocopy of the magazine. At his jury trial, he pleaded entrapment. He was convicted, and the Court of Appeals affirmed. The Court noted that in their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may

prosecute. Sorrells v. United States, 287 U.S. 435, 442. The Court held that JACOBSON was not simply offered the opportunity to order pornography, after which he promptly availed himself of that opportunity. He was the target of repeated Government mailings and communications, and the Government failed to carry its burden of proving predisposition independent of its attention. Thus, rational jurors could not find beyond a reasonable doubt that JACOBSON possessed the requisite predisposition before the Governme-nt's investigation and that it existed independent of the Government's many and varied approaches to him.

In the AVILA opinion delivered on Feb. 27, 1992, the 5th Circuit Court of Appeals failed to recognize that the prosecution failed, as a matter of law, to adduce evidence to support the jury

verdict that Avila was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law.

The 5th Circuit Court of Appeals also made the following finding in the Feb. 27, 1992, opinion:

[16] AVILA similarly argues that the government's evidence of predisposition falls short. Our response is the same: Despite Gallman's initiation of contact with AVILA and Gallman's provision of the opportunity to launder drug funds, Yanez's testimony that he told Gallman that AVILA "has a lot of clients from Mexico in the same business you are," AVILA's complete lack of resistance, and AVILA's energetic participation in the plan to launder "drug" money show that a reasonable jury could have found that he was predisposed to engage in money laundering. The entrapment defense in this case, "as in most cases, was not resolvable by the Court as a matter of law." Nations, 764 F.2d at 1077.

This holding completely fails to meet the new tests of Jacobson. No evidence was ever presented of prior, independent, predisposition. Therefore, no reasonable

jury could find beyond a reasonable doubt that Mr. AVILA was predisposed to commit the crime charged, before the Government's investigation and that it existed INDEPENDENT of the Government's many and varied approaches to him, entrapment as a matter of law is established.

In AVILA, the prosecution's evidence of predisposition falls into the following. First, Yanez stated that he told Gallman that AVILA had "a lot of clients from Mexico in the same business that you are". (OP. P 27, L23). Here, the Court erred in finding that this evidences predisposition because this statement is no evidence of predisposition. The statement is hearsay and is inadmissible as evidence of predisposition. U.S. v. Webster (649 F2d 346, 350 (5th Cir. 1981). Furthermore, such hearsay cannot be a proof of predisposition to violate 18

U.S.C. 1956(a)(3) since said hearsay was allegedly committed prior to the enactment of 18 U.S.C. 1956(a)(3). Furthermore, said hearsay is not proof of predisposition to violate 31 U.S.C. 5313(a) or 31 U.S.C. 5316 because the District Court dismissed those charges on October 4, 1990; Avila was found innocent of those charges at trial. Avila could not have been predisposed to violate a law of which he was found innocent of at trial. This statement was contradicted by AVILA's supervisor who testified as a government witness that AVILA was an excellent broker and that he had no previous problems (RX. 474, 495 - 96).

Secondly, the Court found as a proof of predisposition that AVILA completely lacked resistance (OP)27, L24. Jacobson now teaches us that a lack of resistance is irrelevant as to proof of predisposi-

tion. Furthermore, Avila consistently resisted doing anything illegal.

Thirdly, the Court found that AVILA showed participation ... (OP P28, L1) and that he intended to launder "Drug" money.(OP p28, L1). Again, these findings are irrelevant as to the proof of prior, independent predisposition. Furthermore, the evidence shows that Avila's participation was to do "nothing illegal", Ex.53A,-19); the IRS agent even repeated Avila's own words that Avila would not launder money (Ex.53A,4)

One of the focal words or keys to understanding Jacobson lies with an analysis of the use of the word independent. Appropriate cites from the Jacobson opinion are offered for the Court's consideration.

> Because the Government overstepped the line between setting a trap for the "unwary innocent" and the "unwary

criminal," Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819, 821, 2 L.Ed.2d 848 (1958), and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested, we reverse the Court of Appeals' judgment affirming his conviction. (112 S.Ct. 1535, *1536)

Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985. Sorrells, supra, 287 U.S., at 442, 53 S.Ct., at 213; Sherman, 356 U.S., at 372, 78 S.Ct., at 820. (112 S.Ct. 1535, *1541)

FN3. We do not hold, as the dissent suggests, see post, at 1546; that the Government was required to prove that petitioner knowingly violated the law. We simply conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing. (Cite as: 112 S.Ct. 1535, *1542)

Because we conclude that this is such a case and that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict

> that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails, we reverse the Court of Appeals' judgment affirming the conviction of Keith Jacobson. (112 S.Ct. 1535, *1543)
>
> The Government, the Court holds, failed to provide evidence that Mr. Jacobson's obvious predisposition at the time of the crime "was independent and not the product of the attention that the Government had directed at petitioner." Ante, at 1541. In so holding, I believe the Court fails to acknowledge the reasonableness of the jury's inference from the evidence, redefines "predisposition," and introduces a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect. (112 S.Ct. 1535, *1543)

The other key word in properly understanding the new entrapment doctrine is prior.

> Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government

> agents. United States v. Whoie, 288 U.S.App.D.C. 261, 263-264, 925 F.2d 1481, 1483-1484 (1991). [FN2]
>
> The dissent is mistaken in claiming that this is an innovation in entrapment law and in suggesting that the Government's conduct prior to the moment of solicitation is irrelevant. See post, at 1544-1545.
>
> Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. Sherman, 356 U.S., at 374, 78 S.Ct., at 822.

The Government has asserted that evidence of the Defendant's response to the agent's invitation to launder money and their actions to accomplish the offense could be considered in determining their predisposition to commit those crimes. The prosecutor must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government

agents. Jacobson, id. at 1540.

> In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the **prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act** prior to first being approached by Government agents. United States v. Whoie, 288 U.S.App.D.C. 261, 263-264, 925 F.2d 1481, 1483-1484 (1991). [FN2]

Four justices of the Supreme Court in JACOBSON at 1545, in which Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice KENNEDY joined, and with whom Justice SCALIA joins stated the following:

> Today, the Court holds that Government conduct may be considered to create a predisposition to commit a crime, even before any Government action to induce the commission of the crime. **In my view, this holding changes entrapment doctrine.** Generally, the inquiry is whether a suspect is predisposed before the Government

> induces the commission of the crime, not before the Government makes initial contact with him. There is no dispute here that the Government's questionnaires and letters were not sufficient to establish inducement; they did not even suggest that Mr. Jacobson should engage in any illegal activity. If all the Government had done was to send these materials, Mr. Jacobson's entrapment defense would fail. Yet the Court holds that the Government must prove not only that a suspect was predisposed to commit the crime before the opportunity to commit it arose, but also before the Government came on the scene. Ante, at 1540.

The Government would have the Court believe that subsequent conduct is just as indicative as pre-investigative conduct in establishing predisposition. Unfortunately for the Government, Jacobson's focus is centered entirely on preinvestigative acts and behavior that would establish predisposition.

In United States v. Dion, 762 F.2d 674, 687-88 (8th Cir. 1985), the Eighth Circuit Court of Appeals listed the follo-

wing factors which other Courts have looked to in determining predisposition:

(1) **WHETHER THE DEFENDANT READILY RESPONDED TO THE INDUCEMENT OFFERED.** The evidence shows that AVILA was extremely reluctant to engage in any suspicious activity:

[1] "I cannot wash money." (EX 53 A,4)
[2] "Our business has to be kept straight." (Ex 53A, 6)
[3] "We do business as long as it is legal what we are doing here " (Ex 53A, 11)
[4] "I don't want to do anything illegal." (Ex 53A, 19)
[5] "It's clean money for a clean corporation" (Ex 53A, 20)
[6] "I have many clients and they do whatever they want to do as long as they don't ask us to do anything illegal." (Ex 53A, 21)

(2) **THE CIRCUMSTANCES SURROUNDING THE ILLEGAL CONDUCT.**

Gallman told AVILA that he was in the "coke business." (R. IX, 363, Ex. 53A, 3-4). Gallman further stated to AVILA that "you will not ever be involved in that part of it." (Ex. 53A, 4). AVILA immediately told Gallman that he could not "wash

money." (R. IX, 364, Ex. 53A, 4). AVILA told Gallman that his client was the corporation, and that "our business" had to be "kept straight." (Ex. 53A, 6). AVILA also told Gallman that he would open an account for the corporation and do business with the corporation "as long as it is legal what we are doing here." (Ex. 53A, 12).

(3) THE STATE OF A DEFENDANT BEFORE GOVERNMENT AGENTS MAKE ANY SUGGESTION THAT HE SHALL COMMIT A CRIME.

These factors are: (1) assessing the character or reputation of the defendant, including any prior criminal record. Here, Avila enjoyed an impeccable record prior to this incident. (2) whether the suggestion of criminal activity was made by the government. Here the suggestion came from the government. (3) whether the defendant was engaged in criminal activity

for profit. Here, there was never any proof offered or even hinted at that Avila received any profit. This was even verified during trial. (4) whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion. Here, he continually expressed reluctance. (5) the nature of the inducement or persuasion applied by the government who made constant false representations to induce Avila. United States v. Reynosa-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978).

(4) WHETHER THE DEFENDANT WAS ENGAGED IN AN EXISTING COURSE OF CONDUCT SIMILAR TO THE CRIME FOR WHICH [THE DEFENDANT] IS CHARGED;

Here, none was ever proved or even proffered.

(5) WHETHER THE DEFENDANT HAD ALREADY FORMED THE "DESIGN" TO COMMIT THE CRIME FOR WHICH [THE DEFENDANT] IS CHARGED;

In the Feb. 27, 1992, opinion, the Court found that Gallman initiated all contact with AVILA and Gallman provided the sole opportunity to launder funds. Despite Agent Gallman's repeated inducements and suggestions, when asked by Gallman whether he did not want to do business, AVILA replied "we don't want to do anything illegal." (Ex. 43A, p. 20).

(6) THE DEFENDANT'S REPUTATION;

Avila's reputation was impeccable. There was never any evidence of any sort introduced by the United States of America to prove any prior criminal acts.

For the reasons set above, a writ of certiorari should issue to review the judgment and opinion of the Court of

2.

The Fifth Circuit decided a federal question in a manner that conflicts with the Congressional intent underlying a federal stature. 18 U.S.C. 1956 [laundering of a money instrument] refers only to statutorily defined monetary instruments and not to laundering any type of property. This obligates the Court to render a dismissal or reversal

The government failed to prove that Avila engaged in a "financial transaction" as prohibited by § 1956(a)(3) because, as a matter of law, the cashier's checks which he accepted from Gallman are not "monetary instruments" as that term is defined in the statute. Contrary to trial Court's conclusion, a cashier's check is

not a "bank check" (R. XI, 689). First, the Court erred in deciding that the acts alleged were "transactions involving the movement of funds...". Under the definition for the word "transaction", 18 U.S.C. 1956(c)(3), a transaction would only include "(a) delivery or other disposition with respect to a financial institution." Nowhere in the definition of "transaction" is the "receipt" of funds mentioned. Under the strict guidelines of 18 U.S.C. 1956(c)(3), Gallman conducted a "transaction" and thus a "financial transaction". Mr. Avila did not receive any funds. The transaction was terminated before he received the funds. If the jury had considered the same interpretation of the statute that Congress did, then Mr. Avila could not have been convicted of being involved in a financial transaction. The jury was never instructed as to the

meaning of a "transaction" even though the term "transaction" is defined in 18 U.S.C. 1956 (c)(3). Therefore, no reasonable jury could have found that the alleged acts were "transactions" since they never had the meaning nor the statute thoroughly explained to them for their consideration.

Secondly, under 18 U.S.C. 1956(c)(4)-(A), in the definition of financial transaction, the "movement of funds by wire or other means" was not intended by the legislature to have a common meaning that <u>any</u> movement of funds - whether they are monetary instruments or not - are included. If that was the case, it would make 18 U.S.C. 1956(c)(4)(A)(ii), "involving one or more monetary instruments..." and 1956(c)(4)(B), "a transaction involving the use of a financial institution..." obsolete and unnecessary. The 5th Circuit Court of Appeal's opinion mistakenly holds

that the statute that proscribes laundering a monetary instrument does not require a monetary instrument to commit an offense. As long as there is a movement of funds by wire or "other means", you can have an offense to the laundering of a monetary instrument statute, whether you have a monetary instrument or not.

Thirdly, the Court accepts that what the statute proscribes is laundering a monetary instrument and intent is very clear, namely, to proscribe "laundering of a monetary instrument". The interpretation of the statute is determined by Congressional intent. Under this statute, Congress only proscribes the "laundering of a monetary instrument". No monetary instruments were involved in any transaction between the U.S. Government and Mr. Avila, therefore he could not possibly be found guilty of laundering something which he

was never involved with. Under 18 U.S.C. 1956(c)(4)(A) in the definition of financial transaction, the "movement of funds by wire or other means" was not intended by the legislature to have a universal application that any movement of funds - whether they are monetary instruments or not - are included because, if that was the case, it would make all the other definitions of financial transaction that Congress put in the statute obsolete and unnecessary. The legal foundation the Court of Appeals used is in error.

Fourthly, the cashier's checks that Avila received were not in bearer form or in such form that allows title to pass upon delivery. Thus, they are excluded from the statute since Congress explicitly excluded from the statute those negotiable instruments not in bearer form.

Fifth, in U.S. v Gallo, 927 F2d 815,

822, (5th cir), the Court of Appeals based its decision that the statute that proscribes "laundering a monetary instrument" equates "movement of funds by other means" to "transport of cash in the trunk of a car" as a monetary instrument. The statute has to be strictly construed. There is no case law in which a non-monetary instrument is proscribed by 18 U.S.C. 1956(a)(3).

Sixth, the term "funds" does not include cashier's checks or negotiable instruments not endorsed or in such form that title does not pass upon delivery within the meaning of the term "funds". In fact, the statute the proscribes laundering a monetary instrument gives a detailed explanation of monetary instruments but does not describe the term "funds". This renders the statute "void-for-vagueness" and will be discussed below.

Seventh, the Court of Appeals abused its discretion by ruling on what was not judicially before them. The question raised to the Court of Appeals was whether a cashier's check, not endorsed and not in bearer form, was a bank check and thus a monetary instrument within the definition of 18 U.S.C. 1956. Avila presented numerous cases in which Congress, federal agencies, eleven Courts from eight jurisdictions, and commentators have recognized that bank checks and cashier's checks are different. The government accepted that it was not an offense for Mr. Avila to have received the cashier's checks, because a cashier's check not endorsed and not in bearer form is not a monetary instrument. But the Court of Appeals ignored this and ruled that the statute that "proscribes laundering a monetary instrument", also proscribes non-

monetary instruments.

Eighth, definitions in 18 U.S.C. 1956 & 1957 cover checks and money orders only if they are in bearer form. For purposes of section 1956, a "Financial Transaction" is defined as a transaction involving the movement of funds by wire transfer or by "Monetary Instrument." Monetary Instrument in turn, is defined as cash and various types of checks and money order in "bearer form." Thus, if a drug dealer buys a boat with cash, he can be prosecuted under section 1956 & 1957. But if he has previously deposited the cash into a checking account and writes out a check for the boat, neither statute reaches the transaction. This loophole would have to be closed by CHANGING THE DEFINITION OF MONETARY INSTRUMENT in 18 U.S.C. 1956 (c)(5)."

Thus, the terms "property" and

"funds" include only monetary instruments. If Congress had intended that a "transaction involving the movement of funds by wire or other means" had a generic interpretation, Congress would have modified ONLY this definition and eliminated the monetary instrument definition because it was not longer needed. If Congress had intended that the terms "property" and "funds" had a meaning that involved MORE than monetary instruments, it would have called the statute "laundering of property", or "laundering of funds" instead of "laundering of a monetary instrument."

The Fifth Circuit Court of Appeals cannot go further than Congressional intent and the specific language of the statute, and this Court should not the statute to encompass more than what was intended by Congress and more that what the government intended when it prosecut-

ed.

We pray that Court dismiss the cases against Mr. Avila because his conduct did not violate the statute 18 U.S.C. 1956 "Laundering a Monetary Instrument" within the meaning of the statute.

3.

The Fifth Circuit has decided important questions of federal law concerning the inclusion of non-monetary instruments in the federal statute that proscribes only the "laundering of a monetary instrument" in conflict with federal Congressional intent creating considerable vagueness.

The statute, 18 U.S.C. s 1956(a)(3)-(B) is void-for-vagueness and not intended to apply to an individual such as Avila who was not actively engaged in money-laundering or drug dealing before the initiation of the sting operation. The rule of statutory construction begins with the plain meaning of the words in the statute. United States v. Ransbottom, 914

F.2d 743, 745 (6th Cir.), cert. denied, ---- U.S. ----, 111 S.Ct. 439, 112 L.Ed.2d 422 (1990). The void -for-vagueness doctrine requires that "ordinary" people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). The vagueness of statutes that do not threaten first amendment interests is examined in light of the case at hand. Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988). An examination of 18 U.S.C. s 1956(a)(1)(B) indicates that in order for an accused to be convicted under the above provision, the government must prove that he had the specific intent to conceal or disguise the nature, location, source, ownership, or control of property believed

to be the proceeds of specified unlawful activity. Furthermore, representations must be made by law enforcement officers, or by those acting under their direction, and must relate to specified unlawful conduct enumerated in the statute pursuant to s 1956(c)(7). The provision is clear and applies to anyone who has the requisite intent to engage in the conduct as defined in the statute. United States v. Jackson, 935 F.2d 832 (7th Cir.1991)

First, a person of ordinary intelligence may infer that the statute that proscribes laundering a monetary instrument applies only to monetary instruments. However, it is apparent, that the grand jury, after reading the text of the statute, understood that a "monetary instrument" was required to violate 18 U.S.C. 1956 laundering of a monetary instrument, and return the indictment charging in

count one with conspiracy to launder monetary instruments. Thus, the government prosecuted Mr. Avila on the grounds that cashier's checks were bank checks and thus monetary instruments.

Secondly, in the government's response to defendants motion for judgment of acquittal, the government wrote:

> "Avila contends that a cashier's check does not fall within the definition of monetary instrument as set out in 18 U.S.C. 1956 (c) (5) laundering of a monetary instrument, however, it is apparent that a cashier's check issue by a bank is a bank check."

It is apparent that the government looking at the plain language of the statute understood that a monetary instrument had to be used to commit the offense and did not argue otherwise.

Thirdly, Mr. Avila moved for "Judgment of Acquittal" at trial on the grounds that a cashier's check is not a monetary

instrument (R.T. 126-30) but the Court responded:

> "I read the definition of a monetary instrument and one of the things that can be a monetary instrument is a bank check."

It is apparent that the Court, looking at the plain language of the statute understood that a monetary instrument had to be used to commit the offense and did not argue otherwise.

Fourthly, in the Government's brief in the Statement of the Issues on appeal from the U.S. District Court, whether a Cashier's Check is a Monetary Instrument within the scope of 18 U.S.C. 1956, Laundering a Monetary Instrument, it is apparent that the government, after reading the language of the statute, understood that a monetary instrument had to be used to commit an offense and did not argue it to the Court of appeals as an

issue. The Court of appeals has no jurisdiction to rule on arguments that are not at issue.

Fifth, on page 25 of the government brief, the Government even concedes that the act of accepting a cashier's check is not a violation of the law. Here, it is apparent after reading the plain language of the statute that all parties understood that a monetary instrument had to be used to commit an offense to 18 U.S.C. 1956 Laundering of a Monetary Instrument.

Sixth, also, at oral arguments, Associate Judge of the 5th Circuit, Judge Goldberg, asked the government:

> "Are you trying to tell me that you have a conspiracy with no substance..", the Government agreeing that there were no violations to count 7 & 8."

Again, at oral arguments, the government confessed that after consulting with the U.S. Department of Justice, the Gover-

nment still had a problem to include a cashier's check as a monetary instrument.

It is generally accepted and recognized that a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. No individual should be forced to speculate whether his conduct is prohibited. Any statutory provision that does not give "fair notice as to what constitutes illegal conduct so that (an individual) may conform his conduct to the requirements of the law" is not enforceable. One is not to be subjected to a penalty unless the words of the statute plainly impose it. A person is not required to look beyond the face of the statute and research its legislative history in order to determine whether acts

not within the statute's language are nevertheless prohibited.

4.

The trial Court failed to give Avila's requested jury instructions on specific intent, willfulness, and ignorance of the law and deprived him of a fair trial.

Despite the fact that Avila was charged in the indictment with "willfully" and "knowingly" committing certain unlawful activity, and despite the fact that each of the offenses charged require specific intent, the jury was not so instructed.

Appellant would cite the Court to Cong.Rec. S17360-02, Congressional Record Senate Proceedings and Debates of the 100th Congress, Second Session, Thursday, November 10, 1988, the SECTION ANALYSIS OF JUDICIARY COMMITTEE ISSUES IN H.R. 5210, Section 6465. Undercover "Sting" Operations in Money Laundering Cases-

> The amendment would add to section 1956 a new subsection (a)(3) dealing specifically with undercover operations. The first part of the amendment contains a mens rea requirement that is stricter than that in 1956(a)(1). The defendant would have to have specific intent to promote specified unlawful activity, to conceal what he believes to be the proceeds of such activity, or to avoid reporting requirements. It would not be sufficient, as it is under (a)(1), that the defendant merely know that the transaction was being conducted with the second or third of those purposes in mind.

As given to the jury during the Avila trial, the instruction did not include all the elements of intent that Congress deemed necessary for the offense, as is apparent in the language of the statute. Congress wanted to require a higher mens rea requirement.

The charge as stated by the Court does not make clear that intent is required for both § 1956(a)(3)(A) and § 1953(a)(3)(B). The Court's charge did not require the jury to find any intent for a

violation of § 1956(a)(3)(B). This itself requires reversal of Avila's convictions. Thus, even if the jury concluded that Avila did not act with the intent to promote specified unlawful activity as required by § 1956(a)(3)(A), they may have convicted Avila under § 1956(a)(3)(B) for simply having acted "to conceal and disguise the nature, location, source, ownership and control . . . " of the property in question without finding that Avila intended to do so.

5.

There is a distinct Fifth Amendment "outrageous Government conduct" defense in entrapment cases. Government's conduct was raised to the level of outrageous conduct obligating the Court to render a dismissal or reversal.

The agent's conduct was outrageous and violated Avila's right to due process under the Fifth Amendment. Agent Gallman repeatedly told Avila that he would not be

involved in any illegal aspects of Gallman's business and that the corporation for which Avila opened the account was legal. No federal law enforcement officer should be allowed to affirmatively misrepresent the legality of the conduct of his target.

The Supreme Court left open the possibility that a conviction of a predisposed defendant could be barred under due process principles if police conduct was especially outrageous. United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972), rev'd, 411 U.S. 423 (1973).

Here, in Avila, Gallman supplied Avila with cash, representations of complete legality, and an artificial corporation designed merely to entrap non-predisposed individuals. Courts have barred the conviction of a predisposed defendant in an entrapment case on grounds

that police conduct in the solicitation violated principles of due process. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (Court found substantive due process violation where DEA agent gave the defendant the idea to manufacture drugs, gave him the money to buy the chemicals necessary to manufacture the drugs, provided him with technical expertise regarding the manufacturing process, and gave him a place to set up a drug laboratory.

Courts have unanimously agreed that it is "impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, [and] importuning . . . . " People v. Barraza, 23 Cal. 3d 675, 690, 591 P.2d 947, 955, 153 Cal. Rptr. 459, 467 (1979). Accordingly, the objective test focuses exclusively on the actions taken

by law enforcement officials in their efforts to enlist the defendant in criminal activity rather than on the defendant's predisposition to commit the crime. See Russell, 411 U.S. at 441 (Stewart, J., dissenting). "[T]he focus of this approach is not on the propensities and predisposition of a specific defendant," rather, the question is whether "governmental agents have acted in such a way as is likely to instigate or create a criminal offense." Mathews v. United States, 485 U.S. 58, 66-67 (1988) (Brennan, J., concurring) (maintaining that, but for strong precedent, the entrapment defense should be focused exclusively on government conduct); Hampton v. United States, 425 U.S. 484, 496-97 (1975) (Brennan, J., dissenting) (Basis for entrapment defense should be the elimination of unacceptable methods employed by government.); Sherman, 356

U.S. at 384 (Frankfurter, J., concurring) (Objective test shifts attention from the defendant's predisposition to the conduct of the police.); Sorrells, 287 U.S. at 459 (Roberts, J., concurring) ("Courts must be closed to the trial of a crime instigated by the government's own agents."). State courts adopting the objective standard follow this focus. "[U]nder this test such matters as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant." Barraza, 23 Cal. 3d at 691, 591 P.2d at 956, 153 Cal. Rptr. at 468.

A detailed statement regarding what type of police conduct is permissible has not been enunciated. The standard typically applied in jurisdictions advocating the objective test is whether the actions of the police "create a substantial risk that the offense will be committed by persons

other than those who are ready to commit it." MODEL PENAL CODE s 2.13(1)(b) (1985). Stated another way: "[W]as the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?" Barraza, 23 Cal. 3d at 689-90, 591 P.2d at 955, 153 Cal. Rptr. 467. See also 1 NATIONAL COMM'N ON REFORM OF FED. LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE s 702(2) (1971).

Accordingly, at any point in a proceeding where facts which establish entrapment are introduced, the court should discharge the defendant. The question of entrapment goes to the jury only when there is doubt as to the facts. The opinion of the jury, however, is merely advisory since the power to dismiss the defendant ultimately rests with the court.

In the Eighth Circuit cases where the court held that a defendant was entrapped,

the defendants involved had no criminal record. See United States v. Dion, 762 F.2d 674, 690 (8th Cir. 1985) (Defendant "has never been convicted of any crime, and has a good reputation as a law-abiding citizen."); United States v. Lard, 734 F.2d 1290, 1294 (8th Cir. 1984) (Defendant "had not engaged in any prior criminal conduct."). The absence of a prior criminal record, however, is not sufficient to establish that the defendant was entrapped. United States v. Rodrigues, 433 F.2d 760 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971). Lack of prior record or evidence of the defendant's involvement in criminal activity is not enough to establish entrapment, for if it were, a first- offender who was predisposed to commit the offense charged could seek sanctuary in the entrapment defense. Id. at 762. On the other hand, the presence of

a criminal record or evidence that the defendant engaged in prior unlawful conduct similar to the conduct for which he is charged, even though no criminal record exists, makes the success of an entrapment defense all but impossible.

Here, in the case at bar with Avila, Avila has established entrapment as a matter of law: the evidence clearly indicates that a government agent originated the criminal design; that the United States agent Gallman implanted in the mind of this innocent person, Guillermo Avila, the disposition to commit the offense; and that the defendant then committed any alleged criminal acts at the urging of the government agent. United States v. Shaw, 570 F.2d 770, 772 (8th Cir. 1978). Avila's lack of predisposition to commit the crime is apparent from the uncontradicted evidence. United States v. Lazcano, 881 F.2d

402, 405 (7th Cir. 1989); United States v. Navarro, 737 F.2d 625, 634, cert. denied sub nom. Mugercia v. United States, 469 U.S. 1020 (1984).

The Court of Appeals for the fifth Circuit rejected Avila's claim for outrageous conduct because 1) Avila seemingly confuses the predisposition element of establishing the entrapment defense with the necessary proof of outrageous government conduct; 2) Avila actively participated in the money laundering; 3) Avila has far less of an argument for government over involvement than does Arditti.

However, the Court Erred.

First, Avila doesn't confuse predisposition with outrageous government conduct. Government conduct focuses on the agent. The evidence shows that the government agent's conduct shocks the universal sense of justice and should be prosecuted.

First, the agent's over involvement is proved by the agent creating, designing directing and orchestrating the criminal action from start to finish.

What shocks our sense of justice is that the agent misrepresented the legality of the delivery of the cashiers checks. He let Avila believe it was legal money not related to drugs. The government cannot do that. The government, for the sake of justice, should have given the opportunity for the defendant to know that a certain type of conduct was illegal. We cannot give license to the government agents to prey on the ignorance of the american people. Legislative history tells us that the government should be sure that the defendant believes that the property is the proceeds of unlawful activity. Should have known or might have known is unacceptable. The misrepresenta-

tion gives grounds for believing the act unlawful

Secondly, Avila did not participate in any laundering. Three times the government tells Avila that if he doesn't want to do business he may get up and leave. And three times Mr. Avila answered that he would do business as long as what he does is legal, that he didn't want to do anything illegal and that he didn't wash money.

Three times Avila gave the government the opportunity to clarify the legality of the acts and three times the government refuses to do it - preferring to hide the legality of the acts, preying upon an innocent citizen without giving him the opportunity to defend himself. Opportunity that justifiably Avila should have had. Government conduct was shocking. Government conduct was outrageous.

There are numerous errors of fact that the government cites as Avila's participation in laundering a monetary instrument. For example, the government tells Avila he is in the coke business and Avila stays and completes forms to initiate Gallman's stock account with "estimate".

This is false. That form was completed 26 days before government tells Avila he was in the coke business. The estimates were from Mr. Yanez, not Mr. Gallman and were completed by Avila's secretary (Not Avila's signature).

The Court stated that knowing that Gallman was using a bogus name and was not a Mexican citizen, though he signed a form to that effect to avoid reporting requirements to the Internal Revenue Service.

This is false. The W-8 form signed for an account in the name of Ricardo

Guerra was not accepted by Avila. Avila only accepted a W-8 form for an account under the name of the corporation - Caribbean Basin Finance, Ltd. A foreign corporation. Avila did not witness the signature of this form. The account was not opened under any bogus name. The account was opened to a foreign and legal corporation. The W-8 form is only to avoid withholding on taxes in certain instances. The IRS still is notified of income from dividends, limited partnerships, etc. Even though there is no withholding the IRS still receives a form in which a report of all withholdings and a copy of the W-8 is filed.

The Court indicated that in establishing the brokerage account under these circumstances, Avila violated numerous of his firms policies and rules and hid his knowledge of Gallman's identity and citiz-

enship from his superiors.

This is incorrect. Avila opened a legal foreign corporation account. Avila made sure that the corporation was not doing anything illegal, and that the money to be received in the account was clean, so no rules or firm policies were violated. Avila didn't hide Gallman's identity or nationality from his superiors. Gallman's name appeared as President of Caribbean Basin Financing in all the Pru-Bache corporate account necessary forms.

The Court stated that Avila even assisted Gallman in making his initial investment, suggesting the way to convert Gallman's $15,000 into cashier's checks without Gallman having to produce ID and in a way to avoid reporting requirements to the Internal Revenue Service."

This is erroneous. Avila did not assist Gallman in making his initial

investment. Avila told Gallman that's the only way to purchase cashier's check's with no ID was in amounts of less than $3000 or five checks. Gallman did not do it, so Avila did not assist him. Also, the purpose was not to make an investment but to put the money into a safer form for traveling. Avoiding IRS reporting requirements was never discussed, suggested or mentioned and the charge was DISMISSED by the District Court.

The Court found that once Avila learned that Gallman was a cocaine dealer, he continued to actively and eagerly participate in the scheme to conceal the source of funds and invest them in the market.

Avila was not an active participant in the criminal activities and thus the outrageous conduct defense should prevail.

Thirdly, the only reason Avila could

have far less of an argument for government over involvement than does Arditti is that Avila is charged in three counts and Arditti is charged in six.

The Court of Appeals Erred.

CONCLUSION

For the reasons set above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: October 27, 1992

Respectfully submitted,

_____

EDWARD N. DANERI

Attorneys for the Petitioner

APPENDIX A

Appendix A

UNITED STATES of America, Plaintiff-Appellee,
v.
Victor ARDITTI, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Guillermo AVILA, Defendant-Appellant.
Nos. 90-8646, 90-8721.
United States Court of Appeals, Fifth Circuit.
Feb. 27, 1992.

Securities broker and attorney were convicted in separate trials in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., of conspiracy to launder monetary instruments and of the substantive offense. Defendants appealed and appeals were consolidated. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) broker's conduct violated money laundering statute; (2) instructions were adequate in both trials; (3) defendants were not entrapped; (4) Government did not engage in outrageous conduct; and (5) district court did not abuse its discretion in quashing attorney's subpoena.

Affirmed.

Goldberg, Circuit Judge, filed specially concurring opinion. [1]

393K34
UNITED STATES
K. Mints, assay offices, coinage, and money.
C.A.5 (Tex.) 1992.

Statute proscribing laundering of monetary instruments does not require that suspect have used a "monetary instrument" in his offense. 18 U.S.C.A. s

1956(a)(3).

U.S. v. Arditti

--- F.2d ----, 1992 WL 34381 (5th Cir.(Tex.))

[2]

393K34

UNITED STATES

K. Mints, assay offices, coinage, and money.

C.A.5 (Tex.) 1992.

Cashier's checks accepted by defendant were "property" and "funds" moved by wire or other means within meaning of money laundering statute. 18 U.S.C.A. s 1956(c)(4)(A)(i)

U.S. v. Arditti

--- F.2d ----, 1992 WL 34381 (5th Cir.(Tex.))

See publication Words and Phrases for other judicial constructions and definitions.

[3]

393K34

UNITED STATES

K. Mints, assay offices, coinage, and money.

C.A.5 (Tex.) 1992. 34381 (5th Cir.(Tex.)))

Indictment charged conspiracy to launder a "monetary instrument" under language of governing statute; although cashier's checks were the means through which conspirators were to launder the funds, objective of conspiracy was to launder cash that undercover agent claimed to have obtained through his drug wholesaling activities, and cash was a monetary instrument. 18 U.S.C.A. ss 371, 1956(c)(5).

U.S. v. Arditti

--- F.2d ----, 1992 WL 34381 (5th Cir.(Tex.))

[4]

110K36.5

CRIMINAL LAW

K. Official action, inaction, representation, misconduct, or bad faith. C.A.5 (Tex.) 1992.

Undercover agent's representation that he was in the cocaine business and that the initial $15,000 were the proceeds of a collection satisfied requirement for establishing basis for money laundering "sting" operations that government agent represent that property involved in the transaction was the "proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity." 18 U.S.C.A. s 1956(a)(3).

U.S. v. Arditti

--- F.2d ----, 1992 WL 34381 (5th Cir.(Tex.))

[5]

110K829(1)

CRIMINAL LAW

K. In general.

C.A.5 (Tex.) 1992.

Court of Appeals will reverse for abuse of discretion a district court's refusal to issue a jury instruction only if requested instruction is substantially correct; was not substantially covered in charge actually delivered to jury; and concerns important point in trial so that failure to give it seriously impairs defendant's ability to effectively present a given defense.

U.S. v. Arditti

--- F.2d ----, 1992 WL 34381 (5th Cir.(Tex.))

[5]

110K1152(1)

CRIMINAL LAW

K. In general.

C.A.5 (Tex.) 1992.

Court of Appeals will reverse for abuse of discretion a district court's refusal to issue a jury instruction only

if requested instruction is substantially correct; was not substantially covered in charge actually delivered to jury; and concerns important point in trial so that failure to give it seriously impairs defendant's ability to effectively present a given defense.

U.S. v. Arditti

--- F.2d ----, 1992 WL 34381 (5th Cir.(Tex.))

[6]

91K48.2(2)

CONSPIRACY

34381 (5th Cir.(Tex.)))

K. Particular conspiracies.

C.A.5 (Tex.) 1992.

Trial court's instruction on conspiracy to launder a monetary instrument adequately addressed burden the Government had to bear, and requested instruction as to "willfully" was not necessary. 18 U.S.C.A. ss 371, 1956(a)(3).

U.S. v. Arditti

[6]

11OK829(3)

CRIMINAL LAW

K. Elements and incidents of offense.

C.A.5 (Tex.) 1992.

Trial court's instruction on conspiracy to launder a monetary instrument adequately addressed burden the Government had to bear, and requested instruction as to "willfully" was not necessary. 18 U.S.C.A. ss 371, 1956(a)(3).

U.S. v. Arditti

[7]

110K829(3)

CRIMINAL LAW
K. Elements and incidents of offense.
C.A.5 (Tex.) 1992.
To extent that defendant's requested instruction on specific intent was correct, it was included in instructions on money laundering. 18 U.S.C.A. s 1956(a)(3).
U.S. v. Arditti

[8]
91K48.2(2)
CONSPIRACY
K. Particular conspiracies.
C.A.5 (Tex.) 1992.
When instructing jury on conspiracy to launder a monetary instrument, trial court was not required to instruct jury that it could consider defendant's ignorance of the law; applicable statute did not require Government to prove that defendant intentionally violated a known legal duty. 18 U.S.C.A. ss 371, 1956(a)(3).
U.S. v. Arditti

[9]
110K772(6)
CRIMINAL LAW
K. Defenses in general.
C.A.5 (Tex.) 1992.
Although district court could have included a sentence immediately after its instruction on elements of monetary instrument laundering to explain link between the elements and entrapment, defendant was not entitled to such an instruction. 18 U.S.C.A. s 1956(a)(3).

34381 (5th Cir.(Tex.)))
U.S. v. Arditti

[10]
110K1134(3)
CRIMINAL LAW
K. Questions considered in general.
C.A.5 (Tex.) 1992.
Whether jury misunderstands its instructions is not to be reexamined after the verdict.
U.S. v. Arditti

[11]
11OK37(4)
CRIMINAL LAW
K. Previous innocence or criminal disposition of accused. C.A.5 (Tex.) 1992.
Entrapment defense involves examination of Government inducement and defendant's predispcsition, before contact with government agents, to commit crime charged.
U.S. v. Arditti

[12]
110K739.1(1)
CRIMINAL LAW
K. In general.
C.A.5 (Tex.) 1992.
Entrapment as a matter of law is established only where reasonable jury could not find that Government discharged its burden of proving defendant was predisposed to commit charged crime.
U.S. v. Arditti

[13]
110K569
CRIMINAL LAW
K. Defenses in general.
C.A.5 (Tex.) 1992.
Once defendant makes prima facie showing of entrapment by presenting some evidence that government conduct created substantial risk that offense would be committed by person other than one ready to commit it, burden shifts to Government to prove beyond reasonable doubt that defendant was predisposed to commit the crime and, thus, was not entrapped.
U.S. v. Arditti

[14]
11OK1159.5
CRIMINAL LAW
K. Particular issues or elements. C.A.5 (Tex.) 1992.
On appeal from conviction wherein jury has rejected entrapment defense, standard of review is same as that which applies to sufficiency of evidence.
34381 (5th Cir.(Tex.)))
U.S. v. Arditti

[15]
11OK37(6)
CRIMINAL LAW
K. Particular cases and offenses.
C.A.5 (Tex.) 1992.
Reasonable jury could have found that defendant attorney was predisposed to money laundering and thus was not entrapped; although defendant did not initially seek out government agent, an opportunity

was provided and defendant jumped in with both feet, helping agent to formulate plans to launder "drug" money and advising him on ways to avoid arousing governmental suspicion. 18 U.S.C.A. s 1956(a)(3)
U.S. v. Arditti

[16]
11OK37(6)
CRIMINAL LAW
K. Particular cases and offenses.
C.A.5 (Tex.) 1992.
Reasonable jury could have found thatdefendant securities broker was predisposed to money laundering and thus was not entrapped; despite government agent's initiation of contact, defendant participated energetically in the plan to launder "drug" money. 18 U.S.C.A. s 1956(a)(3).
U.S. v. Arditti

[17]
92K257.5
CONSTITUTIONAL LAW
K. Prosecutorial discrimination or misconduct in general; entrapment. C.A.5 (Tex.) 1992.
Defendant alleging that outrageous Government conduct violated due process must prove not only Government overinvolvement in the charged crime, but also that he had not been an active participant in the criminal activity which gave rise to his arrest. U.S.C.A. Const.Amend. 5.
U.S. v. Arditti

[18]
92K257.5

CONSTITUTIONAL LAW
K. Prosecutorial discrimination or misconduct in general; entrapment. C.A.5 (Tex.) 1992.
Government's conduct in approaching defendants with money-laundering scheme was not so outrageous that due process would bar Government from obtaining conviction. 18 U.S.C.A. s 1956(a)(3); U.S.C.A. Const.Amend. 5.
U.S. v. Arditti

[18]
110K36.5
CRIMINAL LAW
34381 (5th Cir.(Tex.)))
K. Official action, inaction, representation, misconduct, or bad faith. C.A.5 (Tex.) 1992.
Government's conduct in approaching defendants with money-laundering scheme was not so outrageous that due process would bar Government from obtaining conviction. 18 U.S.C.A. s 1956(a)(3); U.S.C.A. Const.Amend. 5.
U.S. v. Arditti

[19]
110K36.5
CRIMINAL LAW
K. Official action, inaction, representation, misconduct, or bad faith. C.A.5 (Tex.) 1992.
Court of Appeals applies prohibition against governmental targeting of defendants in an investigation only where Government employs contingent fee informant and directs him to implicate specific individuals. U.S. v. Arditti

[20]
92K82(6)
CONSTITUTIONAL LAW
K. Particular rights, limitations, and applications.
C.A.5 (Tex.) 1992.
Ninth Amendment does not require that government agents leave subject of an investigation alone once he states that he does not wish to participate in illegal activity. U.S.C.A. Const.Amend. 9.
U.S. v. Arditti

[21]
41OK16
WITNESSES
K. Subpoena duces tecum.
C.A.5 (Tex.) 1992.
Defendant failed to establish with sufficient specificity the evidentiary nature of Internal Revenue Service (IRS) documents requested by his subpoena; defendant did not demonstrate why he wanted to look into the material, and it further appeared that defendant was attempting to use subpoena duces tecum as a discovery device. Fed.Rules Cr.Proc.Rules 16(a)(1), 17, 18 U.S.C.A. U.S. v. Arditti

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U.S. Attys., Ronald F. Ederer, U.S. Atty., San Antonio, Tex., for plaintiff-appellee in No. 90-8721. Appeal from the United States District Court for the Western District of Texas. 34381 (5th Cir.(Tex.)))

Before GOLDBERG, SMITH, and DUHE, Circuit Judges. JERRY E. SMITH, Circuit Judge: *1 Guillermo Avila and Victor Arditti were convicted of conspiracy to launder monetary instruments and of the substantive offense. Avila argues that his conduct did not violate the federal monetary instrument laundering statute, that the jury instructions at his trial were inadequate, and that the government entrapped him and engaged in outrageous conduct in the course of its undercover operation. Arditti also challenges the jury instructions and charges entrapment and outrageous conduct, and he claims that in quashing a trial subpoena the district court deprived him of due process. We affirm.

I.

These appeals arise from an Internal Revenue Service ("IRS") undercover investigation of money-laundering. The defendants were tried separately, but their cases were consolidated on appeal. Because each defendant challenges the conduct of the IRS investigation, we present the facts of the two cases together. We then discuss Avila's argument that his conduct did not violate the statute, each defendant's challenges to the jury instructions, the issues of entrapment and outrageous government conduct as they apply to each, and the quashing of Arditti's subpoena.

II.

In 1988, IRS Special Agent Gary Gallman began

investigating money laundering in El Paso, Texas, using the assumed name of "Gary W. Adams" and portraying himself as a cocaine dealer. Gallman started with information that Gabriel Yanez, who owned a money exchange business, laundered money by handling it to disguise its source. Gallman's goal was to discover Yanez's methods and cohorts.

Gallman first contacted Yanez in May 1988, explaining that he wanted Yanez to help him move large amounts of cash offshore, then bring the money back into the United States in usable form, intimating that he and his associates were involved in illegal activity. Gallman and Yanez invented the name "Ricardo GuerraBattle" and established a Mexican bank account in that name. Yanez twice funneled $100,000 cash through Mexico, arranged for the money to be wire- transferred to Gallman's bank in Dallas, then collected a fee from Gallman. Yanez next arranged for Gallman to open a Cayman Islands account in the "Adams" and "Guerra" names, using a letter of introduction from an El Paso attorney to a Cayman Islands attorney. Gallman later asked Yanez to put him in touch with someone who could help him with business in El Paso. In September, Yanez introduced Gallman to Arditti, an El Paso criminal defense lawyer. During the introductory meeting in September 1988, Gallman told Arditti that he must trust Arditti before he could reveal the nature of his business and explained that Yanez was helping him "get [his money] out and get it back" so that he could use it. Arditti reassured Gallman by mentioning the attorney- client privilege, his previous work with clients involved in drugs, and his distrustful nature.

Arditti told Gallman that since he was "into that

kind of business," he should fund a war chest in preparation for the day he would need money to get out of jail on bond and hire a lawyer. Gallman explained that he couldn't spend any of the money "the way it is right now and that he had "to get it out and get it

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back." Although Arditti told Gallman that he could not advise him on how to launder any illegal funds, Arditti advised Gallman on structuring transactions to purchase real estate in El Paso without arousing suspicion and assured Gallman that the government would not discover any payments made by Gallman to Arditti.

*2 In October, Yanez channeled another $100,000 of Gallman's cash to Gallman's Dallas account after tinkering with the Cayman Islands arrangements. In the meeting discussing the transfer, Gallman told Yanez directly that "he and his group were in the 'coke business' and his part was to handle the money they derived from the sales." Yanez and Gallman seemed to agree that they should follow Arditti's advice in investing in real estate and stocks by using Mexican cashier's checks, using the "Guerra" false name, and making purchases in the name of the British Virgin Islands corporation they had opened to facilitate the offshore Cayman Islands account. Gallman asked Yanez to recommend stock or brokerage houses that the corporation could use to invest in the stock market.

In November, [FN1] Yanez told Gallman about his friend Avila, a securities broker in San Antonio for the firm of Prudential-Bache Securities ("Pru-Bache") who wouldn't insist on meeting Gallman "or anything like

that." Yanez explained that he frequently referred business to Avila and that the two had a fee-sharing arrangement. When Gallman asked what Yanez had told Avila about him, Yanez said that he portrayed Gallman as a Mexican mining client seeking investments. When Gallman further questioned Yanez about Avila, Yanez said that "he has a lot of clients from Mexico in the same business you are, and he never asks questions." During this discussion, Gallman signed the brokerage forms provided by Yanez as "Guerra."

Yanez introduced Gallman and Avila in January 1989 at a hotel in San Antonio. Although Gallman used his undercover name, "Adams," he signed the client agreement and certificate of foreign status (W-8) as "Guerra." The W-8 eliminates brokerage house reporting requirements as to the accounts of foreign nationals and, thus, effectively would have prevented the government from knowing that Ricardo Guerra or Gary Adams was transacting business with Pru-Bache. Gallman told Avila that Gallman was both "Adams" and "Guerra" and that this was "untaxed money" from the Mexican mining operation. Additionally, according to the government, Avila knew that Gallman was not a Mexican citizen, yet told Gallman that he would "take whatever you tell me" when asked whether he felt comfortable about the Mexican mining investor story. Further, Avila told Gallman that because client "confidentiality is a must," he staggered client appointments and entertained at home.

The three arranged for investment funds to come from Gallman through Yanez to Avila. Avila repeated that under law and Pru-Bache policy he could not take

cash and that investments of under $10,000 did not need to be reported to the government. In February, Gallman executed new, backdated documents to change the brokerage account to the name of the British Virgin Islands corporation at Avila's request. As with the first forms, Gallman signed the forms in blank, and Avila completed them.

*3 A few days later in February, Gallman and Avila met again. Gallman plainly told Avila, "I am in the coke business. That's what I do. Now, you will not ever be involved in that part of it." Although Gallman offered Avila the opportunity to back away from the deals because of the source of the funds,

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Avila responded that Yanez had told him that, as long as Gallman provided the investment funds in check form, there was "[n]o problem as to where that money comes f[rom] or how it was made," because the corporation, not "Adams," was Avila's client. Avila asked Gallman whether he was a law enforcement officer, which Gallman denied.

Gallman purported to have recently collected $15,000, which, the government asserts, Avila admittedly understood were the proceeds from a cocaine deal. Avila, however, maintains that Gallman did not tell Avila that he wanted to violate the law or that he did not want to report the cash. Avila stresses that he told Gallman that he did not want to do anything illegal and that Gallman confirmed that the corporation was "legal" and that Gallman was going to deposit "clean money."

After Avila repeated that he could not handle cash, he directed Gallman to obtain cashier's checks in the name of the corporation and told him how to do so.

After Gallman obtained the checks, he met Avila outside Avila's office and gave him two cashier's checks totaling $15,000, payable to Pru-Bache in care of Avila.
Avila deposited the funds in the corporation's account. In March, Gallman delivered to Avila a $40,000 cashier's check, which Avila also deposited.

At Gallman's request, Yanez invited Arditti to meet them for lunch in March 1989. Arditti discussed methods to avoid suspicion and the tracing of money, including not using cash. Gallman offered Arditti the chance to "walk away from the deal" if Arditti had a "problem with the money or what I do." According to Gallman's testimony, when Arditti responded that he had not asked what kind of business Gallman did, Gallman then clarified, "You understand this is coke money," to which Arditti replied, "You don't see me going anywhere, do you?" Arditti disputes Gallman's testimony as to this portion of their conversation and notes that the government failed to taperecord this exchange, nor did Gallman record it in his memorandum concerning the meeting. In May, Gallman met with Yanez and Arditti. Gallman put aside the idea of real estate investments in El Paso and told Yanez and Arditti about an opportunity to invest $200,000 in an Oklahoma oil deal. Gallman revealed that "this money we're doing right now is part of a ten-kilo deal that ... I'm getting paid off for ... now," and stressed protecting his identity in the oil deal. Arditti outlined a complex arrangement for preventing governmental access to Gallman's name through the royalty payment mechanism, perhaps setting up a foreign corporation or, as Gallman suggested, a trust in a foreign bank to receive and

invest Gallman's money. Gallman repeated that "this is coke money" and wanted to know whether he could count on Arditti not to talk if "I end up ... getting busted."

*4 Arditti assured Gallman that he would not divulge anything but again warned Gallman against spending large lumps of cash. Arditti agreed to draft documents memorializing the "loan" of money from the corporation to Gallman, which would explain the source of Gallman's money, and to check on establishing an escrow account to receive Gallman's money and invest it in the Oklahoma deal.

The next week, Yanez told Gallman that the fake loan documents and the escrow account would be delayed because Arditti was being audited by the IRS. Arditti told Yanez he was worried about "being framed" by Gallman. When Yanez passed this information to Gallman and offered to contact another lawyer, Gallman

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insisted on using Arditti.

At the end of May, Gallman delivered $50,000, which Yanez funneled to Gallman's Dallas account. At this time, Yanez attributed Arditti's delay to procrastination but noted that Arditti was "convinced" about how to proceed with the bank in setting up the escrow account. Gallman repeatedly telephoned Yanez over the next few weeks because Gallman wanted Arditti to complete the deal. Yanez continued to insist that Arditti would participate but wanted to take care in structuring the deal. [FN2]

The first infusion of funds to Oklahoma occurred

through Yanez's own bank account at the end of June, not through the escrow account as envisioned by Gallman. Gallman asked for Yanez's help in getting the money to Oklahoma using the escrow account procedure. In mid-July, Gallman met in El Paso with Yanez and Arditti, who explained that they had agreed to the method used in the first transfer because the bank had set up some hurdles in establishing the escrow account. Departing from the escrow account idea, Arditti offered to set up a trust whose funds Arditti would manage, which would also conceal Gallman's identity. The three formulated an elaborate plan to invest money from the corporate brokerage account into the Oklahoma oil deal and completed the arrangements for the fraudulent loan.

With Yanez's participation, Arditti opened a bank account in the name "V.R. Arditti Trust Account Number 3" several days later. No trust documents were prepared for the account, and Arditti alone had signature authority and the code to validate wire transfers. When Arditti received a check from the corporate brokerage account for $50,000 on August 2, he deposited it in the trust account and told the bank to wire $49,000 to the oil deal bank account in Oklahoma.

In mid-August, Arditti gave Gallman a bill for his services. Gallman found the amount "pretty stout," so Arditti adjusted it downward but asked Gallman not to pay him in cash because that would appear suspicious. The three then devised a more efficient plan for future transactions, focusing on the need to shield Gallman by using the "Guerra" name and procuring the funds for deposit in the trust account at a Mexican bank in the form of a cashier's check. As planned,

Arditti received a $50,000 check the next day from a Mexican money exchanger and transferred the money to the oil deal account. On August 29, Arditti, following the same procedure, deposited another $50,000 in the trust account and wired it to Oklahoma.

III.

*5 A grand jury charged Arditti with conspiring with Yanez and Avila in violation of 18 U.S.C. s 371 to (1) avoid filing currency transaction reports in violation of 31 U.S.C. s 5313(a); (2) avoid filing currency or monetary instrument reports in violation of id. s 5316; and (3) launder a monetary instrument in violation of 18 U.S.C. s 1956 (count one). Additionally, the indictment charged Arditti with violating section 1956(a)(3) (counts twelve, fifteen, and eighteen) and violating id. s 2 by aiding and abetting Yanez in violating section 1956(a)(3) (counts fourteen and sixteen). The jury convicted Arditti on all counts.

The indictment charged Avila with conspiring with Arditti and Yanez in violation of section 371 to commit the three offenses outlined above (count one). Additionally, the indictment charged Avila with violating section 1956(a)(3) (counts seven and eight). The district court granted Avila's motion

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to sever his case for trial.

The court granted Avila's motion for judgment of acquittal on the allegations in count one that Avila conspired to violate sections 5313(a) and 5316. The jury, however, convicted Avila on the remaining allegation in count one and on counts seven and eight.

IV.

Avila challenges his substantive and conspiracy

convictions on the ground that his conduct did not violate a criminal statute. Section 1956(a)(3), entitled "Laundering of Monetary Instruments," makes it unlawful for a person, with the intent

(A) to promote the carrying on of specified unlawful activity; (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law, [to] conduct[ ] or attempt [ ] to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity....

18 U.S.C. s 1956(a)(3) (West Supp.1988).

[FN3] Section 1956(c)(4) defines "financial transaction" as

(A) a transaction (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. Section 1956(c)(5) defines "monetary instruments" as follows: The term "monetary instruments" means (i) coin or currency ..., travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery.

Avila urges reversal of his conviction under section

1956(a)(3) because the plain terms of the statute do not criminalize accepting cashier's checks in non-bearer form. Avila argues, as he did in a motion for acquittal, that a cashier's check is not a "bank check" under the relevant definition of "monetary instrument." Avila asserts that Congress did not intend to cover cashier's checks not in bearer form, as evidenced by a federal statute and multiple federal regulations that plainly acknowledge the distinction between a "bank check," i.e., a check drawn by a bank on its account in another bank, and a "cashier's check," i.e., a check drawn by a bank on itself and accepted upon issuance. See, e.g., Bruno v. Collective Fed. Sav. & Loan Ass'n, 147 N.J.Super. 115, 370 A.2d 874, 877 n. 2 (1977).

*6 The government agrees with Avila's characterization of the cashier's checks as non-bearer instruments and accepts Avila's distinctions between cashier's checks and bank checks. Pointing to the legislative history of section 1956, however, the government argues that Congress indeed intended the definition of the term "monetary instruments" to include cashier's checks. "Monetary instruments are a subset of the term 'property' as used in section (a), a term that is intended to be construed liberally to encompass any form of tangible or intangible assets." S.Rep. No. 433, 99th Cong., 2d Sess. 13

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(1986).

Avila responds that the legislative history contextually refers to cashier's checks "in such form that title thereto passes upon delivery," not to all cashier's checks. Id. Moreover, Avila asserts that

Congress's intent is irrelevant when a statute, like this one, is not capable of two rational readings. Cf. McNally v. United States, 483 U.S. 350, 360, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987) ("before one can be punished, it must be shown that his case is plainly within the statute") (citation omitted).

[1][2] Despite the facts that Congress did not include cashier's checks in the statutory definition of monetary instruments and that we must construe criminal statutes strictly, see United States v. Daniel, 813 F.2d 661, 663 (5th Cir.1987), Avila's challenge to his substantive convictions must fail. Simply, the plain language of section 1956 does not require that the suspect have used a "monetary instrument" in his offense. A financial transaction for the purposes of the statute is "[1] a transaction involving the movement of funds by wire or other means or [2] involving ... monetary instruments ... or [3] involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree" (emphasis added). The substantive charges of his indictment, counts seven and eight, do not accuse Avila of laundering a "monetary instrument" as defined in section 1956(c)(5). Rather, count seven states that he conducted "a financial transaction involving property to wit: $15,000 in cashier's checks, represented by a law enforcement officer to be the proceeds of [specified] ... unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(3)." Count eight is similar, except that it specifies $40,000 as the sum in question and does not mention cashier's checks.

The acts alleged in these counts plainly fall within the language of section 1956(c)(4)(A)(i): They were

transactions "involving the movement of funds by wire or other means." The issue of whether cashier's checks are monetary instruments thus is irrelevant to the substantive counts; the checks unquestionably were "property" and "funds [moved] by wire or other means" under the statute.

Although we have not previously interpreted the money laundering statute in this way, the plain language dictates such a holding, and this court has found that the statute encompasses a wide range of conduct. See, e.g., United States v. Gallo, 927 F.2d 815, 822 (5th Cir.1991) (transporting money in the trunk of a car was a financial transaction in that it was a "movement of funds by wire or other means ... which in any way or degree affects interstate of [sic] foreign commerce" (ellipses in original)).

*7 [3] We similarly uphold Avila's conspiracy conviction. The first count of the indictment charged that Yanez, Arditti, and Avila "willfully, knowingly and unlawfully conspired, combined, confederated and agreed together, and with each other, and with others to the Grand Jury unknown, ... to launder a monetary instrument, in violation of Title 18, U.S.C. s 1956. Arditti does not raise the issue on appeal, but Avila appears to argue that this count of the indictment charges a crime that the government did not prove. Simply, Avila asserts that he did not conspire to launder a "monetary instrument" under the language of the statute. If there was conspiracy, Avila argues, it was to launder cashier's checks, which are not monetary instruments as statutorily defined.

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As with the substantive counts, this court need not

consider whether cashier's checks qualify as monetary instruments. Although cashier's checks were the means through which the conspirators were to launder the funds, the objective of the conspiracy was to launder the cash that "Adams" claimed to have obtained through his drug wholesaling activities. Cash, of course, is "coin or currency of the United States" and thus is a monetary instrument. Because Gallman represented to Avila that he wanted to launder cash, and Avila advised him how to convert the cash into cashier's checks without having to present his identification, so that Pru-Bache could accept the money, we reject Avila's argument that no monetary instruments were involved.

V.

[4] Avila further argues that his behavior was not illegal because the government agent did not represent to him that the funds he participated in laundering were the proceeds of criminal activity. Section 1956(a)(3), in establishing the basis for money laundering "sting" operations, requires that the government agent represent that the property involved in the transaction is the "proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity." The statute further defines the term "represented" as "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. s 1956(a)(3).

Avila argues that "[s]trict construction ... requires that the officer make an affirmative representation to the defendant," not merely a suggestion, or just

enough information to create an inference. Nor can the government agent's perception of the "representation" substitute for satisfaction of the element. Because Gallman did not plainly tell Avila that the $15,000 and $40,000 cashier's checks were proceeds from cocaine sales, Avila urges reversal of the convictions.

We find Avila's arguments unconvincing. The record shows that "Adams" told Avila that he was in the cocaine business and that the initial $15,000 was the proceeds of a collection. Because "Adams" represented his business as drug wholesaling, then never represented his relationship with Avila as one involving funds not derived from that illicit industry, the jury could have viewed the later $40,000 as ostensible drug-related funds, believe that Gallman portrays and Avila viewed them as such, and thus convict Avila of money laundering.

*8 To hold that a government agent must recite the alleged illegal source of each set of property at the time he attempts to transfer it in a "sting" operation would make enforcement of the statute extremely and unnecessarily difficult; "legitimate criminals," whom undercover agents must imitate, undoubtedly would not make such recitations before each transaction. In this case, it is enough that sufficient evidence was presented that the jury could have found beyond a reasonable doubt that "Adams" represented, and Avila understood, that the funds they were laundering were the proceeds of the specified illegal activities.

VI.

Avila and Arditti challenge the district court's jury instructions at their respective trials. We find their argument to be without merit. [5] A district court

possesses broad discretion in framing the instructions to

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the jury; we will not reverse unless the instructions taken as a whole do not "correctly reflect the issues and law." United States v. Casto, 889 F.2d 562, 566 (5th Cir.1989), cert. denied, 493 U.S. 1092, 110 S.Ct. 1164, 107 L.Ed.2d 1067 (1990) (citation omitted). This court will reverse for abuse of discretion a district court's refusal to issue a jury instruction only if the requested instruction "(1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that failure to give it seriously impairs the defendant's ability to effectively present a given defense." United States v. Chambers, 922 F.2d 228, 241 (5th Cir.1991) (citation omitted).

[6] The district court defined the offense of conspiracy (count one) in relevant part as follows, essentially tracking the Fifth Circuit Pattern Jury Instructions s 2.21 at 89 (West 1990):

You must be convinced that the government has proved each of the following beyond a reasonable doubt ... Second: That the defendant knew the purpose of the agreement and joined in it with the intent to further the illegal purpose.... So, if the defendant ... knowingly and willfully joins in that unlawful plan on one occasion, that is sufficient to convict him for conspiracy.

The court defined the substantive offense under section 1956, charged in counts seven and eight, in relevant part as follows, tracking the language of the statute: "You must be convinced that the government

has proved each of the following beyond a reasonable doubt ... Second: That the defendant acted with the intent to promote ... or conceal and disguise...."

Avila requested that the jury be instructed that "willfully" "means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law"; and that "[t]o establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law." On appeal Avila argues that the district court's refusal to issue the instructions he requested constituted reversible error, arguing that "willfulness" is a substantive element of a section 371 conspiracy and that "specific intent" is a substantive element of section 1956(a)(3) money laundering.

*9 First, we find that the conspiracy instruction, as a whole, adequately addressed the burden the government had to bear. The requested instruction as to "willfully" was not necessary. The meaning of "willfully" varies depending upon the context. See United States v. Bishop, 412 U.S. 346, 356-61, 93 S.Ct. 2008, 2015-18, 36 L.Ed.2d 941 (1973). The Supreme Court has recognized that in common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional" and that in law the word generally refers to conduct that is not merely negligent. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S.Ct. 1677, 1681, 100 L.Ed.2d 115 (1988).

"Willfulness" appears in neither the section 371 definition of conspiracy nor the section 1956 monetary-instrument laundering statute, and, as

defined in Avila's requested instruction, it is not an element of the conspiracy offense, which requires the state of mind necessary for the substantive crime. See, e.g., United States v. Harrelson, 754 F.2d 1153, 1172 (5th Cir.), cert. denied, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985). The definition

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of willfulness Avila requested is an exception to the traditional rule and is a statutory element of special treatment of criminal tax offenses. United States v. Cheek, --- U.S. ----, ----, 111 S.Ct. 604, 607, 112 L.Ed.2d 617 (1991).

The district court's conspiracy instruction required the jury to find (1) that there was an agreement between two or more persons; (2) that Avila joined the agreement knowing its purpose and with the intent to further the illegal purpose; and (3) that an overt act was committed. Further, the court instructed, "If the defendant knows about a plan, knows that it is an unlawful plan, and knowingly and willfully joins in the unlawful plan ... that is sufficient to convict him for conspiracy." These instructions cover the necessary elements of the conspiracy offense, including the requisite mental state. They thus differ from the charges we rejected in United States v. Burroughs, 876 F.2d 366, 369 (5th Cir.1989), which did not require that the defendant have joined the agreement "knowing its purpose and with the intent to further the illegal purpose," and United States v. Kerley, 643 F.2d 299, 302 (5th Cir. Unit B Apr. 1981), in which we reversed a criminal conviction for failing to instruct on the element of willfulness where such willfulness was actually a "critical element" of the offense. [FN4] We thus conclude that the requested instruction on

willfulness was not substantially correct, and to the extent that it did accurately reflect the law, it was included in the adequate instruction that the district court gave.

[7] Second, we find that to the extent Avila's requested instruction of specific intent was correct, it too was included in the district court's instructions. The court told the members of the jury that they could not find Avila guilty unless they found that he conducted or attempted to conduct a financial transaction involving property represented by a law enforcement officer to be proceeds of the sale of illegal drugs and that he acted with the intent to promote the carrying on of the specified unlawful activity (meaning the drug dealing) or "to conceal and disguise the nature, location, source, ownership and control" of such property. The instruction parallels the wording of section 1956(a)(3) and includes all the elements of intent that Congress deemed necessary for the offense, as is apparent in the language of the statute. If Congress wanted to require any higher mens rea requirement, it would have enacted one. See United States v. Baker, 807 F.2d 427, 428 (5th Cir.1986).

VII.

Avila next argues that the district court erred in not instructing the jury as to his ignorance of the law. In United States v. Davis, 583 F.2d 190, 194 (5th Cir.1978), we held that "the trial court, when instructing that specific intent is required, may not instruct that ignorance of the law is no excuse, because ignorance of the law goes to the heart of the defendant's denial of specific intent."

*10 In 1989 this court ordered a new trial for defendants who had been convicted of conspiring to

commit tax fraud under section 371 and of willfully aiding or assisting fraud in violation of 26 U.S.C. s 7206(2) because "the district court did not instruct the jury that they should, or could, consider the defendants' ignorance of the law." United States v. Buford, 889 F.2d 1406, 1409 (5th Cir.1989). Rather, the district court had instructed the jury that "the presumption is that every person knows what the law forbids." Id.

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The Buford court, however, interpreted the term "willfully" for purposes of the statute criminalizing preparation of fraudulent tax returns to mean a "voluntary intentional violation of a known legal duty" and viewed the absence of a corresponding "ignorance of the law" instruction as "inconsistent with the element of specific intent." Id. (citation omitted; emphasis added). [8] Avila asks us to apply Buford to the case at hand, but the reasoning in that case and the others Avila cites does not support such an extension. Avila urges us to hold that the district court erred because it failed to instruct the jury that it could consider Avila's ignorance of the law, despite the critical distinction that its instructions, and the applicable statute, did not require the government to prove that Avila intentionally violated a known legal duty, nor, for that matter, did the court issue an instruction that the jury should presume that Avila knew what the law was.

As we discussed above, such a concept of "willfulness" is not an element of the offenses with which Avila was charged. Because the instruction Avila requested is not a "substantially correct" statement of the law in this context, we affirm the refusal to include it.

Additionally, to the extent the requested instruction might accurately reflect the law, it was included in the instructions the district court issued. The conspiracy instruction told the jury that it could convict Avila only if it found that he joined the plan knowing that it was unlawful, and the substantive offense instructions provided that the defendant must have had represented to him that the funds were proceeds from specified unlawful activities and that he must have participated with the intent to further those activities or to conceal the funds. Lastly, we note that the entrapment instruction allowed the jury to consider whether the government agent impermissibly coaxed Avila into breaking the law, either through convincing him that his acts would be lawful or otherwise.

VIII.

*11 Arditti challenges the district court's entrapment instructions. The instructions paralleled Fifth Circuit Pattern Jury Instructions s 1.28 at 40 (West 1990), and in relevant part provided that

if the evidence in the case should leave you with a reasonable doubt whether the defendants had the previous intent or purpose to commit an offense of the character charged apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.... The burden is on the government to prove beyond a reasonable doubt that the defendants were not entrapped.

[9] Arditti requested that the district court include a sentence immediately after its instruction on the elements of monetary instrument laundering to explain the link between the elements and

entrapment: "Even if you find that the government has proved each element of this offense beyond a reasonable doubt, you must acquit the defendant if you find that he was entrapped." First, Arditti asserts that the charge as a whole confused the jury; he relies upon jurors' affidavits to show that they did not understand the entrapment instruction and, thus, could not consider the defense. Second, Arditti claims that because, after the defendant makes a prima facie showing of entrapment, the burden shifts to the government to prove that the defendant was predisposed to commit the offense, see United States v. Johnson, 872 F.2d 612, 620 (5th Cir.1989), predisposition becomes an element of the offense. Arditti argues

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that the government's burden becomes heavier when the court directly instructs the jury to consider entrapment as to each count of the indictment. United States v. Allibhai, 939 F.2d 244, 252 (5th Cir.1991), petition for cert. denied, --U.S. ----, 112 S.Ct. 967, --- L.Ed.2d ---(1991). [10] We find that the jury instruction on entrapment was adequate. We first note that the affidavits of juror confusion are not relevant for our decision, as whether a jury misunderstands its instructions is not to be re-examined after the verdict. Robles v. Exxon Corp., 862 F.2d 1201, 1206 (5th Cir.), cert. denied, 490 U.S. 1051, 109 S.Ct. 1967, 104 L.Ed.2d 434 (1989). Second, Arditti may satisfy the first part of the three-part test outlined above, for the requested instruction was substantially correct, but Arditti cannot satisfy the second element, as the instruction was substantially given in the charge

actually delivered to the jury.

Although the district court would not have erred in issuimg the requested instructions, Arditti was not entitled to them. In Allibhai we did say that including an entrapment instruction after each count increases the burden the government must bear, but in context the statement merely meant that the defendants could not claim prejudice because the jury was instructed to consider the entrapment defense separately as to each count. 939 F.2d at 252. Allibhai does not mean that the defendant is entitled to such a placement of the instruction. The instruction the court gave the jury thus accurately reflected Arditti's rights and the government's burdens under the law.

IX.

*12 [11] Avila and Arditti moved to dismiss their respective indictments prior to trial and timely moved for judgment of acquittal based upon entrapment and outrageous conduct, motions that the district court denied. The entrapment defense involves examination of two factors: (1) government inducement; and (2) the defendant's predisposition, before contact with government agents, to commit the crime charged.

[12][13][14] Entrapment as a matter of law is established only where a reasonable jury could not find that the government discharged its burden of proving the defendant was predisposed to commit the charged crime. United States v. Nations, 764 F.2d 1073, 1077, 1079 (5th Cir.1985). Once a defendant makes a prima facie showing of entrapment by presenting "some evidence that Government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it," the burden shifts to the government to

prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and, thus, was not entrapped. United States v. Johnson, 872 F.2d 612, 621 (5th Cir.1989) (citing Mathews v. United States, 485 U.S. 58, 65-66, 108 S.Ct. 883, 888, 99 L.Ed.2d 54 (1988)). "[T]his Court must look to the evidence to determine whether, viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." Id. "On appeal from a conviction wherein the jury has rejected the entrapment defense, the standard of review is the same as that which applies to the sufficiency of the evidence." Id. (citing United States v. Duvall, 846 F.2d 966, 974 (5th Cir.1988)).

A.

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[15] Arditti argues that the government "offered no evidence of predisposition" prior to Arditti's involvement in the offense, disputing the district court's focus upon Arditti's "willing and active participa[tion] in the scheme" as evidence of his predisposition toward the crime. Looking at the evidence in the light most favorable to the government, though, a reasonable jury could have found beyond a reasonable doubt that Arditti was predisposed to money laundering and thus was not entrapped.

As in Nations, 764 F.2d at 1077, there was "no overwhelming evidence of serious resistance" by Arditti. According to the agent's testimony, after Gallman told Arditti that the source of the money involved in the proposed real estate investment was

"coke money," but that if Arditti did not want to be involved in such a deal he could just walk away, Arditti replied, "You don't see me going anywhere." Although Arditti did not initially seek out the government agent, "an opportunity was provided and [Arditti] jumped in with both feet," helping Gallman formulate plans to launder the "drug" money and advising him on ways to avoid arousing governmental suspicion. Johnson, 872 F.2d at 621 (enthusiasm evidenced predisposition, even though government initiated illegal scheme). A jury could view Gallman's testimony and the tape recordings and video recordings of Arditti as proof that Arditti was an " 'eager, active participant' " in money laundering. Duvall, 846 F.2d at 974 (quoting Nations, 764 F.2d at 1077).

B.

*13 [16] Avila similarly argues that the government's evidence of predisposition falls short. Our response is the same: Despite Gallman's initiation of contact with Avila and Gallman's provision of the opportunity to launder drug funds, Yanez's testimony that he told Gallman that Avila "has a lot of clients from Mexico in the same business you are," Avila's complete lack of resistance, and Avila's energetic participation in the plan to launder "drug" money show that a reasonable jury could have found that he was predisposed to engage in money laundering. The entrapment defense in this case, "as in most cases, was not resolvable by the court as a matter of law." Nations, 764 F.2d at 1077.

C.

Both appellants also charge that their convictions should be overturned because the government

investigation constituted outrageous conduct. We traced the evolution of the "outrageous conduct" defense in United States v. Allibhai, 939 F.2d 244, 248 (5th Cir.1991), petition for cert. denied, --- U.S. ----, 112 S.Ct. 967, --- L.Ed.2d ---- (1991). We recalled that a plurality of the Supreme Court, discussing the entrapment defense, noted in 1973 that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from ... obtain[ing] a conviction." United States v. Russell, 411 U.S. 423, 431, 93 S.Ct. 1637, 1642, 36 L.Ed.2d 366 (1973). Although many have asserted the defense, "a due process violation will be found only in the rarest and most outrageous circumstances." United States v. Duvall, 846 F.2d 966, 973 (5th Cir.1988) (citation omitted). [17][18] A defendant must prove not only "government overinvolvement in the charged crime," but also that he has not been an "active participant in the criminal activity which gave rise to his arrest." Nations, 764 F.2d at 1077. In finding no due process violation, the Allibhai panel observed "[a]

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litany of cases in which more extreme government behavior was upheld by courts." Allibhai, 939 F.2d at 248 (citations omitted); see Duvall, 846 F.2d at 975. A review of Arditti's and Avila's arguments on this issue leads to the same conclusion. See Allibhai, 939 F.2d at 249 (rejecting defendants' argument that the "government's conduct in approaching [defendant] with the money-laundering scheme was egregious enough to constitute a due process violation.").

D.

[19] Arditti maintains that the government engaged in outrageous behavior by targeting him without a reasonable suspicion of predisposition to launder monetary instruments. We already have rejected a similar argument, however. This court applies the prohibition against governmental targeting of defendants in an investigation "only where the government employs a contingent fee informant and directs him to implicate specific individuals." United States v. Nissen, 928 F.2d 690, 693 (5th Cir.1991) (citation omitted). In any event, Arditti has produced no evidence that he was the target of the IRS investigation. He was brought in to the money laundering plot by his co- conspirator, Yanez.

*14 Arditti also argues that the government's overinvolvement in the offense and the pressure its agents exerted on him constituted outrageous conduct. This argument also fails, as the quantum of governmental activity did not exceed levels previously condoned by this and other courts, see, e.g., United States v. Tobias, 662 F.2d 381 (5th Cir. Unit B Nov. 1981), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982), and Arditti actively participated in the criminal activity by formulating and carrying out investment plans for the "drug" money. [FN5]

E.

Avila asserts that the government's conduct was outrageous because Gallman initiated all contacts and meetings with Avila and, further, misrepresented the legality of Avila's participation and the business of the corporation. Avila seemingly confuses the predisposition element of establishing the entrapment defense with the necessary proof of outrageous

conduct. Avila actively participated in the money laundering, and he has far less of an argument for government overinvolvement than does Arditti.

F.

[20] Arditti further invokes a Ninth Amendment argument that "a person's liberty, or right to be left alone, is violated when the government persists in attempts to engage the individual in criminal conduct after he has declined to become involved." He suggests that we adopt a bright-line rule that once a subject of investigation states that he does not wish to participate in illegal activity, government agents must leave him alone. Cf. Minnick v. Mississippi, --U.S. ----, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (once suspect requests a lawyer, police must stop interrogation and cannot resume it unless suspect initiates discussion and waives rights).

Nothing in the case law, the statutes, or the constitution requires such a rule, however. In Allibhai we rejected the claim that the right to be left alone forbids the government from targeting an individual in an investigation without a preexisting reasonable suspicion that the subject has been involved in wrong-doing. 939 F.2d at 249 & n. 3 (citing Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., U.S. GOVT. WORKS 34381, *14 (5th Cir.(Tex.))) dissenting)). We then stated that where governmental excess ensnares a nonpredisposed individual, the entrapment defense should be sufficient to protect him. As discussed above, Arditti was not entrapped as a matter of law, and the government's behavior here does not rise to the level of outrageous conduct.

X.

[21] Both before and at trial, Arditti subpoenaed IRS documents including those showing the "nature, goals and targets of its operation," asserting their relevance to his lack of predisposition for his entrapment and outrageous- conduct defenses. Arditti maintains that he needed the information to complete his defense and to summon all minimally reliable evidence in that regard, as guaranteed by the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment. Following the government's statement that the internal memoranda and documents generated by an agency are privileged and thus not subject to discovery, the district court granted the government's motion to quash the trial subpoena because the subpoena constituted a discovery request, bordering on a fishing expedition. Arditti asserts that because the district court neither held a hearing on the motion to quash nor availed itself of the opportunity offered by the government to view the documents in camera, his rights were violated, and he requests a hearing wherein the government will be required to show that its privilege as to the documents should overcome his right to present evidence in his defense.

*15 We review a grant of a motion to quash a subpoena for abuse of discretion. Cf. United States v. Reeves, 892 F.2d 1223, 1226 (5th Cir.1990) (upholding district court's refusal of pretrial request to inspect government files under Fed.R.Crim.P. 16(a)). We find that the district court did not abuse its discretion in quashing the subpoena.

Rule 16(a)(1) precludes "the discovery or inspection of reports, memoranda, or other internal government

documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case...." Arditti essentially argues that the "subpoena at issue is a trial subpoena," covered by Fed.R.Crim.P. 17, which rule 16 does not govern because it only applies to "discovery of evidence prior to trial." Certainly Arditti could not gain discovery to the subpoenaed material under rule 16. Moreover, he does not establish that even the potentially longer reach of rule 17(c) stretches to those materials.

Our analysis of this issue begins with Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951), which discusses the relationship between rule 16 and rule 17(c). There, the Court upheld an antitrust defendant's subpoena directing the government to produce documents, books, and objects it had obtained during the course of its investigation, even though such materials were not discoverable under rule 16. The district court held that the defendant might be able to obtain some such materials under rule 17(c), "as long as they are evidentiary." Id. at 219, 71 S.Ct. at 678. Although rule 17 extends to materials not subject to rule 16 discovery, it is not intended to provide an additional means of discovery. Id. at 220, 71 S.Ct. at 679. Every subpoena must be a "good faith effort ... to obtain evidence," and the district court may ensure that rule 17(c) is used only to that end through the court's power to quash or modify subpoenas. Id. at 219- 20, 71 S.Ct. at 678-79.

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The Court enunciated the burden a party must bear to gain access to materials under rule 17 in United States v. Nixon, 418 U.S. 683, 697-702, 94 S.Ct. 3090,

3102-05, 41 L.Ed.2d 1039 (1974). On appeal, Arditti must satisfy three requirements. He must show that (1) the subpoenaed document is relevant, (2) it is admissible, and (3) it has been requested with adequate specificity. Id. at 700, 94 S.Ct. at 3103. These specificity and relevance elements require more than the title of a document and conjecture as to its contents. In Nixon, the Watergate special prosecutor was permitted to obtain audio tapes that the president was trying to retain, because he had shown that "there was sufficient likelihood that each of the tapes contain[ed] conversations relevant to the offenses charged in the indictment." Id. He met this burden by offering sworn testimony of participants in the recorded conversations, or by giving reasons that permitted a rational inference of relevance, as well as by making a sufficient preliminary showing of admissibility. We conclude that Arditti did not meet his burden under rule 17 and Nixon. In quashing the subpoena, the district court found that "I think it's not only discovery, but borders on a fishing expedition." This finding is supported by Arditti's argument before us: "The government's purpose, method and means of targeting and then pursuing Mr. Arditti are relevant to both the entrapment and the due process defenses. To ascertain these particulars, Arditti sought the documents that would set forth the objectives of the undercover operation and the intended targets of that operation." (Emphasis added.) *16 Arditti thus has failed to establish with sufficient specificity the evidentiary nature of the requested materials. He has demonstrated why he wants to look into the material, but he has not set forth what the subpoena's materials contain, forcing the court to speculate as to

the specific nature of their contents and its relevance. Accordingly, it appears that Arditti was attempting to use the subpoena to gain knowledge that he could not obtain under rule 16(a)(1), as much as to obtain evidence, i.e., that he was trying "to use the subpoena duces tecum as a discovery device, which it is not." United States v. Nixon, 777 F.2d 958, 969 (5th Cir.1985). In this context, the district court did not abuse its discretion in quashing the subpoena. AFFIRMED. GOLDBERG, Circuit Judge, specially concurring: When one door closes, fortune will usually open another. [FN6] The Rule 16 door closes, so a criminal defendant attempts to pry open the Rule 17(c) portal. The district court, as keeper of the Rule 17(c) gate, hears the chanting of the "open sesame!" [FN7] incantation--"let me obtain the evidence"-but cannot unlock the entry, for the recitation fails to satisfy the demanding requirements of Rule 17(c). I concur in the majority opinion and write merely to elucidate the distinction that I see between Rules 16 and 17(c) and to explain the district court's duties, as I see them, in evaluating a Rule 17(c) subpoena duces tecum. See Majority Op. slip opinion at ---- - ----. The issue is whether Arditti satisfied the requirements of Federal Rule of Criminal Procedure 17(c), "which governs the issuance of subpoenas duces tecum in federal criminal proceedings." United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 3102, 41 L.Ed.2d 1039 (1974). Rule 17(c) provides that "[a] subpoena may also command the person to whom it is directed to produce the

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books, papers, documents or other objects designated therein." Fed.R.Crim.P. 17(c).

Certainly a Rule 17(c) subpoena duces tecum is not a discovery device. Nixon, 94 S.Ct. at 3103 (citing Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951)). Rule 17(c) is not intended "to provide an additional means of discovery beyond that provided in Rule 16." United States v. Vanegas, 112 F.R.D. 235, 238 (D.N.J.1986) (citations omitted); see United States v. Nixon, 777 F.2d 958, 968-69 (5th Cir.1985); United States v. Marcello, 423 F.2d 993, 1006 (5th Cir.), cert. denied, 398 U.S. 959, 90 S.Ct. 2172, 26 L.Ed.2d 543 (1970). This is because a "Rule 17(c) subpoena reaches only evidentiary materials"--not all discoverable materials. United States v. Cuthbertson, 651 F.2d 189, 195 (3rd Cir.) (citing Bowman Dairy, 71 S.Ct. at 679) (emphasis added), cert. denied, 454 U.S. 1056, 102 S.Ct. 604, 70 L.Ed.2d 594 (1981).

However, "[a]ny document or other materials, admissible as evidence ... is subject to subpoena" under Rule 17(c). Bowman Dairy, 71 S.Ct. at 679. Rule 16, which severely restricts discovery in criminal cases, does not define the outer limits of materials available under a 17(c) subpoena, nor how wide the Rule 17(c) door will open. Indeed, documents and materials possessed by the government but not discoverable under Rule 16 can be reached by a Rule 17(c) subpoena--so long as the documents and materials are evidentiary. Cf. id. at 678.

*17 The rule allows "[t]he court on motion made promptly [to] quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed.R.Crim.P. 17(c); see also Nixon, 94 S.Ct. at 3103.

The district court thus wields "its power to rule on motions to quash or modify" to control the opening of the Rule 17(c) gate. Bowman Dairy, 71 S.Ct. at 678. Under the Rule 17(c) standard, then, the district court must determine whether the subpoena constitutes a "good-faith effort ... to obtain evidence." Id., cited in United States v. Noriega, 764 F.Supp. 1480, 1493 (S.D.Fla.1991). A party does not have to use all materials subpoenaed under 17(c) in evidence to satisfy this test. Id. Rule 17(c) merely requires that the moving party make a good faith effort to obtain evidence--instead of embarking on "a fishing expedition to see what might turn up." Id. 71 S.Ct. at 678, 679 (holding subpoena's "catch-all provision ... not intended to produce evidentiary materials"); see In re Martin Marietta Corp., 856 F.2d 619, 622 (4th Cir.1988), cert. denied, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989).

To this end, a party demanding materials must unfasten three locks to free the 17(c) door. The rule requires not only that the materials be relevant and admissible, but also that the demand must be sufficiently specific as to the documents requested. Nixon, 94 S.Ct. at 3103 (setting out the showing necessary to require production prior to trial under 17(c)). [FN8] We entrust these decisions to the discretion of the trial court "since the necessity for the subpoena most often turns upon a determination of factual issues." Id. 94 S.Ct. at 3104.

In the ordinary case, I would expect the district court to review the material in camera to determine whether the specificity, relevancy and evidentiary nature of the material warrants its production. [FN9] This case is the rare exception: the district court did

not avail itself of the opportunity to

(C) WEST 1992 NO CLAIM TO ORIG. U.S. GOVT. WORKS 34381, *17 (5th Cir.(Tex.)))

review the material in camera before deciding to grant the motion to quash the subpoena. Rather, the court determined, without in camera review, that Arditti sought to travel the forbidden path--he wanted to embark on a "fishing expedition to see what might turn up" on the other side of the Rule 17(c) gate. If Arditti had displayed the three Nixon keys--that is, made a threshold showing that the demand was specific and the material relevant and admissible--then the district court would have abused its discretion by not peering through the keyhole and reviewing the material in camera. But Arditti did not brandish the keys labelled "specificity," "relevancy" and "admissibility." The court properly denied entry because fortune alone will not open the Rule 17(c) door. FN1. The district court instructed the jury that it could not consider any acts prior to November 18, 1988, the effective date of 18 U.S.C. s 1956(a)(3), relating to the charge of conspiracy to violate the statute. FN2. To buttress his claims of entrapment and outrageous government conduct, Arditti has pointed out several facts regarding the contacts between Yanez and Arditti after the May transaction, specifically: (1) Yanez told Gallman that he contacted Arditti or visited his office every day; (2) Arditti seemed so reluctant to do Gallman's work that Yanez suggested hiring another lawyer to complete Gallman's work; and (3) Gallman contacted Yanez three times on May 30 and 13 times in June to ask about Arditti.

FN3. All references herein are to the 1988 version of s 1956. Congress subsequently amended the statute, but altered only one of the provisions relevant here, s 1956(c)(5) (clarifying, not enacting substantive changes to, definition of "monetary instruments"). FN4. See also Fifth Circuit Pattern Jury Instructions s 2.21, at 91 (West 1990) (proposed conspiracy instruction "adequately addresses the requirement of a specific intent to violate the law" if no "special state of mind," e.g., premeditation, required by substantive offense); id. s 1.36 at 52 ("we have attempted to define clearly what state of mind is required, i.e., what the defendant must know and intend to be guilty of the particular crime charged"). FN5. See Allibhai, 939 F.2d at 248-249 (discussing cases); accord

United States v. Yater, 756 F.2d 1058, 1067 n. 12 (5th Cir.) cert. denied, 474 U.S. 901, 106 S.Ct. 225, 88 L.Ed.2d 226 (1985) (discussing outrageousness of government's conduct in manufacturing drugs "with only meager assistance from the defendants" in United States v. Twigg, 588 F.2d 373 (3d Cir.1978)). FN6. Fernando de Rojas, La Celestina act XV.
FN7. The Arabian Nights (A Thousand and One Nights)--The History of Ali Baba (Galland trans.); cf. William Shakespeare, Macbeth act IV, sc. i ("Open, locks, Whoever knocks.").

34381, *17 (5th Cir.(Tex.))) FN8. See United States v. Komisaruk, 885 F.2d 490, 495 (9th Cir.1989) ("A court is justified in quashing a subpoena duces tecum if production would be immaterial, unreasonable, oppressive and irrelevant."); Martin Marietta, 856 F.2d at 621 ("Enforcement of a Rule 17(c) subpoena is governed by the standards

established in United States v. Nixon.");

Cuthbertson, 651 F.2d at 197 ("we emphasized that the material sought by the rule 17(c) subpoena must be evidentiary and relevant") (Sietz, C.J., concurring) (citations omitted); Vanegas, 112 F.R.D. at 239 ("relevant evidentiary materials subject to subpoena under Rule 17(c)"). FN9. See, e.g., Nixon, 94 S.Ct. at 3103 (concluding that a "sufficient likelihood" existed that the content of the tapes were "relevant" and "admissible"); United States v. Fowler, 932 F.2d 306, 311-12 (4th Cir.1991) (affirming district court's denial of application for subpoenas because district court properly determined that information sought was irrelevant and had no evidentiary value); Martin Marietta, 856 F.2d at 622 (upholding district court's order compelling production of materials under 17(c) because district court properly determined that subpoena satisfied Nixon requirements after in camera production of documents, but remanding for in camera review as to claims of work-product privilege); United States v. LaRouche Campaign, 841 F.2d 1176, 1180 (1st Cir. 1988) (affirming district court's order requiring production of documents for in camera review because threshold showing of "admissibility, relevancy, and specificity" meant the subpoena was not "unreasonable or oppressive" under 17(c)); Nixon, 777 F.2d at 969 (affirming district court's refusal to order production of government files under 17(c) because in camera inspection revealed that materials were not relevant);

Cuthbertson, 651 F.2d at 195 (reversing order releasing materials because district court did not use its in camera review to "evaluat[e] the material against the evidentiary requirement of rule 17(c)");

United States v. Poindexter, 732 F.Supp. 135, 138, 141 (D.D.C.1990) (ordering disclosure of certain documents after briefing by the Parties and in camera review to determine relevancy under 17(c)); Vanegas, 112 F.R.D. at 239 (granting motion to compel production of handwriting exemplars prior to trial under 17(c) based on determination of relevancy and admissibility).

APPENDIX B

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-8721

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
GUILLERMO AVILA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING
(June 2, 1992)

Before GOLDBERG, SMITH AND DUHE, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/ s

United States Circuit Judge